

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH D. IRWIN, SR. and REVA
JOAN IRWIN, Individually and as
Administrators of the Estate of
KENNETH D. IRWIN, JR., deceased

v.

NATIONAL ASSOCIATION FOR STOCK
CAR AUTO RACING, INC., d/b/a
"NASCAR",

SABCO RACING, INC., and

CHIP GANASSI RACING WITH FELIX
SABATES, d/b/a SABCO RACING,
INC.

CIVIL ACTION

NO. 02-CV-03335

HON. JAN E. DuBOIS, J.

O R D E R

AND NOW, this _____ day of _____, 2002, upon
consideration of Defendants' Motion to Dismiss, and Plaintiffs'
response thereto, it is hereby ORDERED that said Motion is
DENIED as moot.

BY THE COURT:

JAN E. DuBOIS, J.

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PLAINTIFFS' ANSWER TO DEFENDANTS'
MOTION TO DISMISS WRIT OF SUMMONS

Plaintiffs, by their undersigned counsel, hereby answers
the Motion to Dismiss of defendants, and requests that said
Motion be denied as moot.

This case should be remanded to the Court of Common Pleas
for Philadelphia County, for the reasons contained in
Plaintiffs' Motion to Remand filed on June 5, 2002.

Respectfully submitted,
KESSLER, COHEN & ROTH, P.C.

DATE: _____

WILLIAM D. MARVIN, ESQUIRE
Attorney for Plaintiff

KESSLER, COHEN, & ROTH, P.C.
Attorney ID# 34265
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Philadelphia, PA 19102
(215) 567-3500

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MEMORANDUM OF LAW

I. INTRODUCTION

The Motion to Dismiss should be denied as moot, because this case should be remanded to state court.

II. DISCUSSION

The plaintiffs' pending Motion for Remand details why the defendants' attempt to invoke removal jurisdiction is unfounded, and therefore this action should be remanded to the Common Pleas Court. The primary reason removal was improper is that the plaintiffs' decedent was a citizen of North Carolina, the same state as one of the corporate defendants. Therefore, complete

diversity of the parties is lacking, and thus subject-matter jurisdiction is absent in the federal courts. Moreover, the Writ did not establish other necessary elements for removal jurisdiction.

Plaintiffs' Writ of Summons is entirely proper in the state court, under the Pennsylvania Rules of Civil Procedure. Defendants could and (and did) serve a Rule to File Complaint before removing the action to this Court, thereby obligating plaintiffs to file their substantive pleading within twenty days, or seek additional time to complete pre-complaint discovery and prepare their Complaint.

Functionally, the defendants' Motion to Dismiss is the equivalent of a state court Rule to File Complaint, because the requested relief would require plaintiffs to file their Complaint within ten days. The defendants argue that the Writ does not contain a "statement of the claim" as required by Rule of Federal Procedure 8(a). However, the Federal Rules' application to the Writ of Summons is strictly a result of the defendants' own action in attempting removal from state court.

Accordingly, because the case should be remanded to state court, this Court need not review the merits of the present Motion to Dismiss. On remand, defendants can avail themselves of state court pleading and discovery procedures to learn the specifics of plaintiffs' claims. The Motion to Dismiss the Writ

of Summons is moot and therefore should be denied.

Respectfully submitted,
KESSLER, COHEN & ROTH, P.C.

DATE: _____

WILLIAM D. MARVIN, ESQUIRE
Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

WILLIAM D. MARVIN, attorney for plaintiffs, hereby
certifies that true and correct copies of the foregoing were
served upon counsel for all other parties, by first-class mail,
as follows:

Dean F. Murtagh, Esquire
German, Gallagher & Murtagh
The Bellevue, Suite 500
200 S. Broad Street
Philadelphia, PA 19102
Counsel for Defendants

Respectfully submitted,
KESSLER, COHEN & ROTH, P.C.

DATE: _____

WILLIAM D. MARVIN, ESQUIRE
Attorney for Plaintiffs